(3)

No. 91-371

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TAMPAM, INC.,

Petitioner,

v.

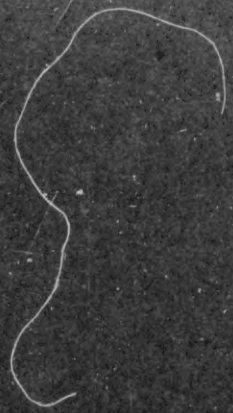
OGLE COUNTY BOARD OF REVIEW,
SUPERVISOR OF ASSESSMENTS FOR OGLE COUNTY,
COUNTY TREASURER OF OGLE COUNTY,
also acting as Collector of Taxes, and
THE COUNTY OF OGLE,

Respondents.

Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Second Judicial District

REPLY TO BRIEF IN OPPOSITION

THOMAS R. McMILLEN
Counsel of Record
560 Green Bay Road
Suite 400
Winnetka, Illinois 60093-2238
(708) 446-4999
Counsel for Petitioner



QUESTION PRESENTED

Whether Respondents have advanced any persuasive reason why the Petition for Writ of Certiorari should not be granted so as to permit a full and needed review of the Federal issues presented therein.

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REPLY TO BRIEF IN OPPOSITION

ARGUMENT

Petitioner, TAMPAM, Inc. (an acronym) files this Reply Brief pursuant to Supreme Court Rule 15.6. Respondents have raised some quarrels with our Petition but are apparently unable to take any substantial issue with the merits. Their brief argues questions of fact which are either not supported by the record or are contrary

to the record.

The last phrase of Rule 14.1(h) is not applicable to our Petition and in any event is satisfied by the decisions in the Appendices to the Petition. Respondents' counsel admits that the jurisdictional requisites are adequately set forth in the Petition (Brief p. 1, line 1).

Respondents then irresponsibly claim that we attempt to mislead this court in our Statement of the Case (Brief p. 2). This is repeated elsewhere in Respondents' Brief and raises the new issue of ethics in this Court. To the extent that Respondents' arguments might have any bearing on the issues, we will attempt to set the record straight.

Respondents' two argumentative Statements of the Case (Brief p. 2 and p. 3) make the following misleading or unsupported contentions, and we mention

only the most egregious:

1. That Petitioner failed to appear at a hearing scheduled by the Ogle County Board of Review is written twice in succession on p. 2 of the Brief. Petitioner's Statement of the Case does not even mention this Board. The point is entirely irrelevant, was not raised in any court proceeding, and was not mentioned in any decision of either the trial court or the Illinois Appellate Court. If this point was intended to show (erroneously) that Petitioner failed to exhaust administrative remedies, it is of no weight in a cause of action under 42 U.S.C. §1983. Patsy v. Board of Regents, 457 U.S. 496 (1982).

2. That there is nothing in the record to show clear and intentional "discrimination" by the Ogle County Assessor (Brief p. 2). Granting that the majority of the Appellate Court made this same error,

the Second Amended Complaint (and in fact the First Amended Complaint) alleged in par. 8 that the illegal assessments had been a "pattern and practice of the defendants for many years. ... Defendants have knowingly and intentionally continued their discriminatory and unlawful taxing procedures up to the present time." (Petition App. E, pp. 6-7.) The settlement stipulation, we submit, concedes the pertinent allegations of the Second Amended Complaint as to the two taxing procedures then terminated by the trial court.

3. That the "original complaint" was filed by Philip Nye, Jr. and by him alone is not relevant. The original complaint became Count II which, as Respondents' attorneys knows, is not involved in this appeal and for which neither Nye nor any other attorney submitted any petition for fees, as is shown by the itemized Petitions for Fees.

The record also shows that Nye's firm declined to take the case on its merits and stated under oath that no other attorney in the Circuit would do so. Respondents' misstatement thus helps to support Petitioner's compliance with the debatable decision in Chrapilwy v. Uniroyal Inc., 670 F.2d 760 (7th Cir. 1982).

4. The Order Approving Stipulation for Settlement was not drafted by Attorney McMillen (Brief in Opposition p. 5) nor by any attorney for Petitioner. The Order is erroneous because the Stipulation did not settle all matters in dispute. Some of the allegations of illegal taxing procedures remain in the Second Amended Complaint which is still pending in the trial court. Judge Cargerman eventually realized this and sua sponte entered an order for an interlocutory appeal on his fee award. If the case had in fact been fully concluded, then the Appellate Court

should not have heard the interlocutory appeal on attorneys' fees, but neither that Court nor the State's Attorney raised the point. The Appellate Court specifically backed off from becoming involved with the substantive merits of the case (Petition App. A, p. 8).

5. Although the Assistant State's Attorney did argue that the amount of the requested fee was unreasonable, he did not argue that the roads claim was not "viable" under Sec. 1983. This allegation and all of the other allegations of the Amended Complaint and Second Amended Complaint had survived his successive motions to dismiss. If the roads claim was not "viable" as pleaded under Count I, the State's Attorney had no right to settle it.

In fact the State's Attorney did not raise any one of the specific points relied on by the trial court in reducing the

petition from $74,693.91 by successive steps down to $16,345.91. This feat was accomplished solely by Respondents' industrious aide, the trial court judge.

6. Respondents have not distinguished the second holding of Beverly Bank v. Board of Review of Will County, 117 Ill.App.3d 656 (3d Dist. 1983). That court remanded the case for trial under Sec. 1983, based upon a violation of the Equal Protection Clause. This same cause of action is pleaded in par. 8 of Count I of the Second Amended Complaint, citing the 5th and 14th Amendments (App. E, pp. 5, 7). The second prong of the case supports Petitioner.

After Beverly Bank was decided, the United States Supreme Court held that "intentional and purposeful" discrimination need not be shown by the acts of public officials if discrimination in fact occurred. e.g. Zinerman vs. Burch, 110 S.Ct.

975 (1990).

In discussing the constitutional "viability" of the roads claim, Respondents and the trial court also ignore the "taking" clause of the 5th Amendment (Petition p. 6), which was not involved in the Beverly Bank case. The roads claim was filed solely under Count I, based solely on Sec. 1983 which enforces the applicable Federal and Illinois constitutional provisions and statutes, and was constitutionally viable when the claim was settled.

7. On p. 15 of the Brief, Respondents' counsel erroneously states that the Ogle County State's Attorney did not "proffer" an offer of settlement. Except for its inaccuracy, the statement is innocuous. The offer of settlement was made orally by an assistant state's attorney, Douglas Floski, to the Petitioner's counsel when the case was to be set for trial. Being

even more than was sought on the roads and wasteland claims in the Second Amended Complaint, Floski's offer was accepted on the spot, before the case was called. There was no discussion of the other claims of illegal taxation and no discussion of ending the case by a judgment order or dismissal with prejudice. None of the attorneys on the Respondents' Brief participated in this case on the trial level, and Mr. Floski has left.

We do not find the statement, quoted on page 15, lines 1214 of Respondents' Brief, in the record, and it is factually erroneous.

8. Respondents' counsel must have a different edition of Martindale-Hubbell (sic) than we do. None of the three attorneys named on page 15 of the brief appear in the 1991 Edition, and a firm's

rating is based upon the highest rated member. This Court can judicially notice the directory under Federal Rule of Evidence 201(h). Of course, the question of ratings in that publication is not in the record because Mr. Floski never so much as mentioned the Chrapilwy search and find rule.

9. It is true that Petitioner's counsel presided over the second trial in Lenard v. Argento, 808 F.2d 1242 (7th Cir. 1987), Plaintiff's counsel spent 250 hours of their 3,400 hours on the second trial. Nowhere in our Petition do we refer to this case nor to any of the other numerous cases in which we did set fees. We believe all of them were correctly decided on the trial level; only Lenard was reversed.

10. Another cheap shot is the contention that the trial court did not "appoint" Petitioner's counsel to represent

the class. The record shows that Assistant State's Attorney Floski objected to the certification of the plaintiff's class and to Petitioner's attorney representing the class because of an alleged conflict of interest. After research by Ms. Suizzo and the undersigned, it was determined that there was no legal or ethical impediment to continuing the representation of the class by the corporation's attorney. Therefore, the trial court judge overruled the State's Attorney's objection and ruled that the same attorney could represent both the class and the class representative.

11. The trial court cited Chrapilwy (Petition, App. C, p. 44), but not on the point being discussed in the Petition at pp. 32-33. The cases cited by Respondents and by the trial court on their "forum rate" argument (Brief p. 19) are significant, however, to

demonstrate a split between the Circuit Courts of Appeal on this issue. If this Court's terminology "market rate" and "relevant market" means the forum rate, then payment on the basis of the forum guideline violates every fee decision of this Court since Hensley v. Eckerhart, 461 U.S. 424 (1983). The court did not apply a forum rate in Maceira v. Pagan, 698 F.2d 38 (1st in 1983), nor in In Re Agent Orange Product Liability Litigation, 818 F.2d 226 (2d Cir. 1987), both cited by Respondents at p. 17 of their Brief, nor in many other cases where outside counsel voluntarily came in (e.g. Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980 en banc); In Re Fine Paper Anti-Trust Litigation, 751 F.2d 562 (3d Cir. 1984).

Only this Court can clarify and render the terms "market rate" and "relevant market" a bright line for guidance of attorneys and the courts.

12. The record does demonstrate that Petitioner canvassed the local bar of Ogle County to handle this case. Respondents state that we "contacted" only one law firm to do so. This is only half true. Affidavits of Attorney Nye and Attorney McMillen to the effect that no attorney in the Fifteenth Judicial District would take this case on the basis of a fee to be awarded under 42 U.S.C. 1988 are in the record, uncontradicted. (Petition, App. A-1, pp. 40-41). Justice Reinhard's dissent correctly points out that Petitioner did satisfy the requirements of Chrapilwy, however unrealistic they may be.

13. Respondents' final argument (Brief p. 20-23) apparently was added because their other two headings fail to raise any substantial issues to defeat the Petition. We did not raise the question of the 50% enhancement in the Appellate

Court nor in our Petition in this Court. It is not an issue on appeal because Petitioner sees no point in taking up this court's time by an exercise in futility.

CONCLUSION

We regret that this Reply Brief is occupied to a large extent by matters which might more properly be raised by a motion under Rule 11. This argument should have been settled by the Illinois Supreme Court. However, we suspect that it did not wish to become enmeshed with Federal problems over which it has no control.

We reiterate the alternative that this controversy can be resolved expeditiously by reversing the decision of the Illinois Appellate Court, First District, and leaving Justice Reinhard's dissent as the law of the case, or alternatively remanding the case to the

trial court so that Petitioner can be accorded the hearing which it requested on the points raised for the first time by the decision of ex-Judge Cargerman.

Respectfully submitted,

Thomas R. McMillen

Counsel for Petitioner
560 Green Bay Road
Winnetka, Illinois 60093